No. 83-1249

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN CARY SIMS AND SIDNEY M. WOLFE, PETITIONERS

v.

CENTRAL INTELLIGENCE AGENCY AND WILLIAM J. CASEY, DIRECTOR OF CENTRAL INTELLIGENCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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TABLE OF AUTHORITIES

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Cross-petitioners contend that the court of appeals erred in affirming the district court's ruling that the Central Intelligence Agency need not disclose the identities of institutions that employed researchers who served as intelligence sources for the Agency.

1. The facts and background of this case are recounted in our petition in No. 83-1075 (see 83-1075 Pet. 2-8). In brief, cross-petitioners filed suit under the Freedom of Information Act (FOIA), 5 U.S.C. 552, seeking, among other things, the names of private researchers who performed research for the CIA in connection with a CIA project known as MKULTRA. Research for this project was performed by many individuals affiliated with institutions such as universities; cross-petitioners sought the names of both the individuals and the institutions.

In response, the CIA invoked Exemption 3 of the FOIA, which provides that an agency need not disclose "matters that are * * * specifically exempted from disclosure by statute * * * provided that such statute * * * refers to particular types of matters to be withheld" (5 U.S.C. 552(b)(3)(B)). The statute on which the CIA relied is Section 102(d)(3) of the National Security Act of 1947, which provides in part that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure" (50 U.S.C. 403(d)(3)). The Agency contended that the researchers were "intelligence sources" and therefore exempt from disclosure under Exemption 3 and 50 U.S.C. 403(d)(3).

The United States District Court for the District of Columbia initially rejected the Agency's Exemption 3 claim (83-1075 Pet. App. 77a-79a). The court of appeals subsequently vacated the district court's ruling, propounded a definition of "intelligence sources," and remanded for reconsideration in light of that definition (*id.* at 35a-64a). The court of appeals' definition was as follows (*id.* at 50a):

> [A]n "intelligence source" is a person or institution that provides, has provided, or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it.

On remand, the district court ordered the disclosure of the names of about half of the individual researchers and the institutions with which they were affiliated (83-1075 Pet. App. 21a-34a). The district court held that the identities of the other researchers were exempt from disclosure either because they had sought and received express promises of confidentiality from the Agency (*id.* at 26a) or because they had engaged in other intelligence activities, apart from

MKULTRA, for the CIA (*id.* at 31a). The district court also ruled that the Agency need not disclose the institutional affiliations of the individual researchers whose identities were exempt from disclosure (*id.* at 27a, 34a).[1] This is the ruling to which cross-petitioners now object.

Both sides appealed, and the court of appeals reversed in part and affirmed in part (83-1075 Pet. App. 1a-11a). The court of appeals stated that "[a]lmost all of the District Court's various rulings were judicious and proper" (*id.* at 3a). But the court of appeals faulted the district court for focusing on whether researchers had received promises of confidentiality; the court of appeals stated that "proof that the CIA did or did not make promises of secrecy (either express or tacit) to specific informants * * * [cannot] be dispositive of the question whether a given informant qualifies as an 'intelligence source' " (*id.* at 6a). The court of appeals entered an order reversing "the District Court's determination regarding which of the individual reasearchers satisfy the 'need-for-confidentiality' portion of the [court of appeals' definition] of 'intelligence source' " but affirming "[a]ll other aspects of the [district] court's decision" (*id.* at 11a).

On March 5, 1984, this Court granted our petition for a writ of certiorari in No. 83-1075. That case presents the question whether the court of appeals' definition of "intelligence sources" is correct.

2. Cross-petitioners do not suggest that the issue they raise is inextricably bound up with the question presented in No. 83-1075, or that the Court will be unable fairly to resolve the question presented in No. 83-1075 unless it grants the cross-petition. Instead, they cross-petition simply

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[1]The district court did not discuss the institutions, but when it entered its order it exempted them from disclosure.

because they believe that the courts below erred and that they are entitled to relief—the disclosure of the identities of all the institutions at which MKULTRA research was conducted—that they will not receive if this Court simply affirms the court of appeals' decision.

a. If this Court disagrees with our submission in No. 83-1075 and upholds the court of appeals' approach, the district court, on remand, will apply the court of appeals' definition of "intelligence sources" to some of the individual researchers whose identities it had previously exempted from disclosure.[2] Upon doing so, the district court might determine that the identities of some of those individual researchers should continue to be protected from disclosure. Cross-petitioners have not challenged this aspect of the court of appeals' ruling. They do appear to contend, however, that those individuals' institutional affiliations should be subject to disclosure.[3] This assertion is incorrect.

Neither the district court nor the court of appeals explained in detail its reasons for exempting from disclosure the institutional affiliations of those individuals whose identities are exempt. But as cross-petitioners recognize, the basis of the decision below is nevertheless reasonably clear: identification of the institutions could enable interested parties (such as a hostile foreign intelligence service) to

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[2]It appears that the court of appeals reversed only the district court's ruling on the researchers who were exempted because they had received promises of confidentiality and affirmed the district court's decision to exempt those individuals who had engaged in other intelligence activities, in addition to MKULTRA, for the CIA.

[3]If the identity of an individual researcher is correctly ordered to be disclosed, it may no longer be appropriate to exempt that individual's institutional affiliation from disclosure. We do not interpret the court of appeals' order necessarily to require that the district court continue to exempt an institution's identity after it is disclosed that an individual at that institution performed MKULTRA research.

identify the researchers.[4] This was a principal reason advanced by the CIA in the district court for protecting the identities of the institutions (see J.A. 115);[5] it was the argument the Agency made to the court of appeals in defending the district court's decision (see Gov't C.A. Br. 34-37); and it was the reasoning that the court of appeals used in *Gardels* v. *CIA*, 689 F.2d 1100 (1982), where it held that the Agency need not confirm or deny the identities of institutions at which it has professional or academic intelligence sources.

This Court should not review the district court's and the court of appeals' concurrent determination that, where an individual's identity remains exempt, his institutional affiliation should also be protected in order not to provide a lead that can be used to identify the individual. As cross-petitioners' own arguments reveal, that determination is essentially fact-bound; cross-petitioners' contention is that the evidence does not support the district court's ruling. See, *e.g.*, Pet. 4 ("[T]here was no evidence to show that identification of institutions would lead to identification of researchers."); *ibid.* ("For * * * reasons [based on the particular facts of this case] * * * it was highly unlikely that the

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[4]Cross-petitioners leave no doubt that they regard this as the basis of the decision of the courts below. They assert that "there was no evidence to show that identification of institutions would lead to identification of researchers" (Pet. 4; see *id.* at 5-6) and that "it was highly unlikely that the disclosure of the institutions could lead to the revelation of the researchers" (*id.* at 4). Cross-petitioners also characterize the question presented by their petition as involving "the extent to which an agency must prove that identification of a non-confidential entity will lead to disclosure of a confidential source" (*id.* at 5).

We note that while we agree that this was the basis of the decision below, we believe that the institutions at which MKULTRA research was conducted are exempt from disclosure for the additional reason that they are themselves "intelligence sources."

[5]"J.A." refers to the Joint Appendix filed in the court of appeals on January 3, 1983.

disclosure of the institutions could lead to the revelation of the researchers."); *id.* at 5-6 ("[T]here was no evidence offered to show that identification of these institutions * * * would lead to the identification of exempt researchers."). Cross-petitioners ask the Court to provide "guidance" on this issue (*id.* at 5), but it is unclear what kind of guidance the Court can provide; rather, cross-petitioners are asking the Court to review the record and decide if it supports the decision of the courts below.

A CIA affidavit provides a basis for the district court's ruling that disclosure of the institutions would risk revealing the identities of the individual intelligence sources they employed. It was appropriate for the court to defer to the Agency's judgment on this question. "This is, necessarily a region for forecasts in which informed judgment as to potential future harm should be respected." *Gardels*, 689 F.2d at 1106. There is, accordingly, no reason for this Court to reassess the lower courts' resolution of this issue.

b. We note that cross-petitioners' contentions have no logical relationship to the question presented in No. 83-1075. That question concerns the definition of intelligence sources. Cross-petitioners have no quarrel with the court of appeals' definition of intelligence sources; they simply contend that the courts below erred in concluding that when an individual whom they considered to be an intelligence source was affiliated with an institution, it was necessary to exempt the institution from disclosure in order to protect the individual source. It is certainly appropriate for this Court to determine the correct definition of "intelligence sources" exempt from disclosure under the FOIA without considering the more fact-bound question of—to use cross-petitioners' words—"the extent to which an agency must prove that identification of a[n] * * * entity" that may not

itself be an intelligence source "will lead to disclosure of a confidential source" (Pet. 5).[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1984

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[6]See page 5 note 4, *supra*.